Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT

OF THE

UNITED STATES OF AMERICA

OCTOBER TERM, 1994

Don Fuller, pro se

Petitioner,

vs.

Secretary of Defense, et al.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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14 pp

QUESTIONS PRESENTED FOR REVIEW

ARE THERE TWO CLASSES OF AMERICAN CITIZENS?

Does the Constitution of the United States, as amended, guarantee - during peacetime - those humans, in any form, of the uniformed services of the Armed Forces of America the **equivalent** constitutional protections regarding employment as are guaranteed to the citizens not in the uniformed services?

TEMPORARY JUDICIAL OVERSIGHT OF THE UNITED STATES NAVY DEPARTMENT

Does the Constitution of the United States of America permit or require Article III courts to temporarily oversee peacetime employment decisions and actions of DOD civilian and military leaders exercising poor judgement and diminished integrity when America's national security capability is compromised and the Constitutional and civil rights of uniformed service members are intentionally and systemically violated?

INJURY TO REPUTATION AS A "LIBERTY" AND "PROPERTY RIGHT"

Is there an unconstitutional deprivation of liberty in violation of the Due Process Clause and the equal protections guaranteed by the Fifth Amendment when individual federal government officials are permitted to intentionally defame and repeatedly and maliciously injure an individual's reputation and then assert the **Feres Doctrine** to thereby deprive the victim of any opportunity for a sufficient process to protect the individual's interest in his/her reputation?

"INDIVIDUAL" FEDERAL EMPLOYEE'S ACCOUNTABILITY FOR BIVENS TYPE MISCONDUCT

When the United States Government has waived sovereign immunity under the Federal Tort Claims Act for negligent acts, may individual DOD employees who cause intentional harm be shielded from **Bivens** Claims by asserting the defense of the **Feres** Doctrine so that a victim who is not receiving any IRR pay and who was not subject to any military orders is denied a remedy and

forum for determining damages for deprivation of civilian associational and employment rights, damage to professional reputation, and the taking of property in violation of the Due Process Clause and the equal protections guaranteed by the Fifth Amendment?

THE *FERES* DECISION

When the United States Government has waived sovereign immunity under the Federal Tort Claims Act, may it be shielded by the ***Feres*** Doctrine from damages caused by tortuous actions of its employees or agents which cause injury to a civilian attorney acting in furtherance of his professional responsibilities to his civilian clients and for damage also caused to the professional reputation of an all-volunteer military reservist who is not receiving any reserve pay and is not subject to any orders requiring service as a uniformed member of the Armed Services?

FUTILE EXHAUSTION OF REMEDIES

When the decisions and integrity of former Secretary of the Navy Garrett and acting Secretary of the Navy Kelso are severely questioned by the President or Congress prior to their resignations and there is pervasive evidence of systemic failure and abuse of the Department of the Navy personnel employment and medical procedures such that a full-time civilian attorney and part-time all-volunteer non-paid uniformed service member has suffered grave damage to his liberty and property rights guaranteed by the Fifth Amendment, must there be an exhaustion of remedies to the Board of Corrections for Naval Records before seeking judicial relief in a Article III Court?

THE UCMJ IN THE CIVILIAN COMMUNITY?

Does the UCMJ apply to a physically injured, unpaid, off-duty, not subject to either military orders or discipline Individual Ready Reservist concerning an alleged, but never committed or proven, petty

criminal matter upon which all allegations were legally and ethically resolved in favor of the civilian practicing attorney who after receiving a face to face death threat in retaliation for his reporting Defense Investigative Service misconduct had purposely acted to obtain access to a judicial forum, acted to create a public record of the misconduct, and received subpoena powers in the civilian community so as to expose criminal wrongdoing by Defense Investigative Service personnel who were repeatedly and viciously violating the Constitutional and civil rights of civilian defense contractor personnel?

ARTICLE 134 OF THE UNIFORM CODE OF MILITARY JUSTICE

Is Article 134 of the Uniform Code of Military Justice unconstitutional due to its vagueness, its arbitrary and capricious application, and its propensity for furthering unlawful command influence?

SECRETARY OF THE NAVY INSTRUCTION 1920.6 AND MARINE CORPS ORDER P 1900.16

Do SECNAVINST 1920.6 and MARINE CORPS ORDER P 1900.16 unconstitutionally permit the Secretary of the Navy and the Commandant of the Marine Corps to use a panel of officers rather than a administrative law judge to arbitrarily deprive military personnel of liberty and property rights guaranteed by the Due Process Clause and the equal protections of the Fifth Amendment; to arbitrarily use UCMJ Article 134 in an employment administrative hearing; and to "deem" that a purely military offense has been "committed" in the civilian community by a non-paid, not under military orders IRR reservist; to ignore the presumption of innocence and no conviction; to ignore the Minnesota Lawyer's Board of Professional Responsibility determination of no unethical misconduct; to ignore a "good faith" exculpatory polygraph but to consider "anonymous phone tips"?

LIST OF PARTIES TO THE PROCEEDINGS

Petitioner, Don B. Fuller, Pro Se.

Respondents are as follows:

Secretary of Defense of the United States of America

Secretary of the Navy of the United States of America

The Commandant of the United States Marine Corps

The Director, Marine Corps Reserve Center

The Commanding General, Fourth Marine Division, United States Marine Corps

---

The following public officials were named in their official capacities in the proposed Amended Complaint filed in the United States District Court for the District of Minnesota in which Petitioner sought Declaratory Judgment regarding restoration to duty as a Marine Corps Reserve Officer.

Secretary of Defense of the United States of America

Secretary of the Navy of the United States of America

The following individuals were named as additional and indispensable parties in Petitioner's proposed Amended Complaint filed in the United States District Court for the District of Minnesota in which Petitioner sought punitive and treble money damages for **Bivens** claims. The Petitioner's motion for leave to amend the Complaint was denied partially for the reasons that pursuing a **Bivens** claim would be "futile" under existing circumstances due to the Court's decision in **Feres**.

Robert L. Turay, Former Twin Cities DIS Field Chief, now resigned

Lee Olson, Former Twin Cities DIS agent, now resigned

Lee R. Sampson, Twin Cities DIS Agent

Robert Simpson, Twin Cities DIS Agent

Lee Haurilick, Twin Cities DIS Agent

Robert Small, AUSA

Lt. Alicia Connolly, United States Navy lawyer

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F. Appellate Court Affidavit re Illegal DIS Surveillance, Miscarriage of Baby, and Bivens Misconduct by DIS Agents

G. UCMJ Article 134

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I. MARCORPSEP MCO P 1900.16 - Relevant Section

J. Request for Admissions of Admiral Frank Kelso, (acting) Secretary of the Navy

K. H. Lawrence Garrett IV not processed for administrative discharge despite Article 15 findings of active duty use of marijuana, larceny, receipt of stolen property, soliciting another to steal and allegations of lying to NIS agents.

L. Administrative Delays Frustrate Due Process and Lead to Seeking Article III Court Review rather than Continue Exhausting Failed Administrative Process.

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NO. _____

IN THE UNITED STATES SUPREME COURT

OF THE

UNITED STATES OF AMERICA

October Term, 1994

DON FULLER, PRO SE, Petitioner

vs.

SECRETARY OF DEFENSE, et al Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioner, Don Fuller, pro se, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the the United States Court of Appeals for the Eighth Circuit failure to consider the grave Constitutional issues presented by the Petitioner.

This case presents the Court with important Constitutional issues concerning:

(1) the Constitutional rights of American humans voluntarily serving in the all-volunteer and reserve Armed Forces;

(2) whether America is a nation of reasoned law or a nation where some men are above the law;

(3) the Court's responsibility to its citizens in uniform and to our democratic form of government as initially envisioned by the drafters of the Constitution and then eloquently interpreted by Chief Justice John Marshall in **Marbury v. Madison**, 1 Cranch 137 (U.S. 1803).

How long can this nation expect private citizens to volunteer to serve our country in uniform on active duty and in the reserves; to provide for our collective national security; and to continue to defend the Constitution when the few who do volunteer are subjected to morbid, disparate,

and unconstitutional treatment without remedies, as follows:

(1) Intentional and systemic deprivation of Constitutional rights of federal, military and civilian defense contractor employees working in a "extremely hostile work environment" which has:

a. **Permitted** uniformed service members to gang rape enlisted males using instruments but their commanding officers were still promoted to "flag or general officer status": and

b. **Permitted** the chief labor lawyer of a major military base (more than 50,000 employees) to continue on active duty despite illegally terminating an older Phi Beta Kappa female secretary so he could hire a younger blonde woman who he stated would provide him with sex in his office; and

c. **Permitted** a senior active duty military recruiting officer serving in the civilian community to remain on active duty and be honored despite his continued public reference to African-Americans as "Spear Chuckers", "Orangutans" and "Gorillas in the Mist"; and

d. **Permits** "blanket parties" in which junior enlisted personnel are singled out for punishment and then they are anonymously and viciously beaten in their beds after being awakened. No one is **ever** held accountable.

(2) Impermissible and systemic retaliation and retribution for the civilian attorney Petitioner reporting the following extreme acts of employment misconduct by Department of Defense (DOD) personnel:

a. Intentional deprivation of liberty by purposefully destroying employee's reputations and using the military psychiatric community to undermine the validity of otherwise accurate "whistle blower's" reports; and

b. Intentional falsification and fabrication of employment records which affect military careers, promotions, retention and the quality of eventual civilian employment; and

c. Harassment and intimidation of DOD and civilian contractor personnel using impermissible and illegal domestic surveillance of homes like in a "secret police force";

d. Unauthorized and illegal investigations and obstruction of justice by threatening professional and personal harm, including death,

of other federal employees cooperating with the Justice Department to expose the wrongdoing; and

e. Illegal arms and equipment sales for profit by paid federal employees prior to and during the war with Iraq.

(3) Intentional **Bivens** violations by individual federal employees, operating under "color of law" who now seek to shield themselves from accountability by invoking the **Feres Doctrine** against Petitioner who is a civilian attorney.

(4) Capricious use of the vague UCMJ Article 134 and the administrative discharge procedures **to favor active duty** personnel including Navy Admiral Frank Kelso and the son of the Secretary of the Navy and **to harm reservists**, to wit;

a. Intentional **nonuse** of Article 134 of the UCMJ and SECNAVINST 1920.6

in active duty TAILHOOK cases as best illustrated by the promotion and award of an increased joint and survivor pension to Admiral Frank Kelso and his spouse.

b. Intentional **use** of Article 134 of the UCMJ and SECNAVINST 1920.6, against the Individual Ready Reserve Petitioner despite the findings of an American civilian court and the lawyer's professional board that Petitioner had not committed any illegal or even unethical misconduct in the civilian community while acting solely as a civilian attorney.

c. Permitting H. Lawrence Garrett III and Admiral Frank Kelso [acting as the Secretary of the Navy (SECNAV) and the ("acting" SECNAV), respectively], to unlawfully take official action to separate Colonel

Fuller from the Marine Corps Reserves after reducing him in grade from Colonel to Lt. Colonel and thereby also causing Petitioner to suffer a lifetime reduction in pension benefits.

d. Permitting the Navy Department to reach into the civilian community and assert jurisdiction over a non-paid, non-drilling, not on duty, physically disqualified IRR reservist and "**deem**" Petitioner's civilian behavior to somehow constitute "disorders and neglects to the prejudice of good order and discipline in the armed forces", despite Petitioner providing an exculpatory polygraph and substantial witness affidavits to demonstrate that Petitioner only appeared to be in trouble in the civilian community to force the

issue of the repeated and systemic DOD DIS abuse and death threats off the streets where DIS agents could not be held accountable and into a court of law where DIS agents could someday be subpoened and also held accountable.

The Egregious Bivens Misconduct is Capable of Repetition Yet Evading Review

The intentional egregious misconduct of DOD personnel and the systemic failures within DOD caused the harm inflicted upon the Petitioner which unfortunately although not unique is capable of repetition as the military records of Colonel Fuller have been greatly fabricated by and illegally disseminated into the civilian community and to unlawfully influence "administrative hearing" by DIS agents. The fabricated records will continue to cause irreparable harm for the remainder of Don Fuller's life.

The DOD and DIS agents first threatened Don Fuller with professional and personal harm and then engaged in intentional **Bivens**-type misconduct over a period of years. [Separate Appendix Exhibits C through F].

The continued failure to hold accountable those "individuals" acting under color of law but beyond the law undermines national defense capability, daily undermines the quality of America's national defense and permits unconstitutional misconduct to permeate the Navy Department. [Appendix Exhibits C, D, E, F, J, and K].

Bivens-type misconduct also deprives all-volunteer active duty and reserve uniformed personnel, DOD civilian employees and the civilian defense contractor workforce of their Constitutional, civil and human rights without providing any effective forum or remedy for recovery of substantial harm. [Appendix Exhibits A through F].

THE PRAYER FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit which:

(1) failed to consider any of the Constitutional questions presented by the Petitioner:

(2) failed to review the "discretionary" actions of former Secretary of the Navy H. Lawrence Garrett and Admiral Frank Kelso or the senior hearing officer at the Marine Corps administrative hearing who threw a pencil at the Petitioner as Petitioner testified: and,

(3) assumed that former Secretary Garrett and acting Secretary Kelso acted properly and in accordance with the rules of their public office; and,

(4) failed to appreciate the inability of the Board of Corrections of Naval Records (BCNR) to consider or determine "grave" Constitutional issues and the

Eighth Circuit panel thereby failed to properly follow the Eighth Circuit's decision in Horn v. Schlesinger, 514 F. 2d 549 (CA8 1975).

(5) failed to reverse the District Court's opinion which:

(a) **failed to consider the Constitutional questions** presented by the Petitioner;

(b) dismissed the Petitioner's Complaint;

(c) required the Petitioner to exhaust administrative remedies before the (BCNR) which cannot consider nor decide Constitutional questions affecting the associational and employment rights of the civilian attorney and which would force the Petitioner to engage in a "futile effort"; and which

(c) denied the Petitioner the right to amend the Complaint to assert

"individual" **Bivens** claims based on the conduct of "individuals" who intentionally and maliciously violated the Constitutional, civil and employment rights of the Petitioner who was forcefully acting as a "lightening rod" to redirect all DIS abuse and who "zealously" defended and protected civilian defense contractor employees who were suffering extreme depravation of their own Constitutional and employment rights and suffered the effects of extreme emotional distress, including the miscarriage of a fetus;

(d) incorrectly determined that Petitioner suffered only injuries incident to his service when Petitioner could not be serving due to his status as a non-paid, not

physically qualified, not under orders IRR reservist not on any type of duty;

(e) failed to appreciate the extent of the damage to Petitioner's civilian law practice as DIS agents substantially interfered with the attorney client relationship and engaged in unlawful retaliation when Petitioner first reported their abuse "within the system"..

The Petitioner asserts that Constitutional issues not considered by the District Court or the Eighth Circuit Court of Appeals are never "moot" and hearing by the United States Supreme Court is requested.

The Opinions of the Eighth Circuit and the District Court correctly state that Petitioner, in his amended complaint, sought restoration to duty as a Marine Corps Reserve Colonel and this is an issue which remains undecided.

Systemic Harm to Individuals in Administrative Proceedings and Art. I Section 8 Courts.

Until senior civilian and military leaders are held accountable Petitioner argues that such misconduct is certainly capable of repetition yet evading review.

Appendix K contains quotes from a decision of the United States Navy-Marine Corps Court of Military Review 93-00141 Published 13 June 1994. The case discussed the favored status of Yeoman Seaman [YNSM] H. Lawrence Garrett, IV, who was <u>not processed for administrative discharge</u> despite being found guilty of active-duty use of marijuana, larceny of food and gasoline, receipt of stolen property, and soliciting another to steal.

YNSN Garrett is son of the then-Secretary of the Navy H. Lawrence Garrett III who was asked to resign his office by President Bush. The Court said:

> In the case of the son of the Secretary of the Navy, "...the military justice process was

infected throughout by senior naval officers who considered the accused rather than what he had done."

"We do find that RADM Williams, due to his close personal relationship with the Secretary, engaged in actions of favoritism towards [the Secretary's son] to such an extent that NIS agents believed he might have been obstructing justice."

"Preferential treatment of a suspect based on his family relationship to a high-ranking officer or civilian has no place in any reputable justice system."

"....[T]he integrity and fairness of the military justice system cannot accept such a result."

The Secretary's son, "...was not processed for administrative discharge following the Article 15 proceeding. Not only is it uncommon, but it is extraordinary that a Sailor could be found to have used marijuana repeatedly, to have stolen property using stolen credit cards taken from a Navy mail room, to have received stolen property by using those cards, to have asked another Sailor to steal a vacuum cleaner by using another Sailor's stolen credit card, and to have lied to NIS agents under oath and then be retained on active duty without being processed for discharge. In this case, that result is not inexplicable. Based on out experience, we state with confidence that, absent

extraordinary circumstances, any other Sailor in the U. S. Navy who faced such charges would have been tried by a court-martial.

"In summary, we find that YNSN's transfer was based solely on his status as the son of the Secretary. The **decision** that his offenses should be disposed of at an Article 15 proceeding and **that he would not be processed for administrative discharge thereafter was based on that same status**.

The need for temporary judicial oversight of the Department of the Navy is compelling.

The well researched U. S. News & World Report article of November 9, 1992 pages 46-62 [included as a part of the District and Appellate Court record] corroborates that the Article I Section 8 Naval Justice system is presently incapable of protecting the Constitutional rights of individual service members.

The U. S. News & World Report report article contains admissions attributed to Navy admirals and a former SECNAV that fabricated reports and "anonymous phone tips"

are often used to damage the military reputations of military personnel.

Those records and the resulting conditions of separation from service thereafter affect the quality of civilian employment.

The actions of the SECNAV and other DOD personnel which reached out and harmed Don Fuller in his civilian law practice and interfered with his civilian attorney-client relationships and the defense of his civilian law clients thereafter also denied Don Fuller a fair and impartial hearing process which deprived Petitioner of Constitutional rights guaranteed by the Fifth Amendment.

NO WITNESSES, EVER

No witness has ever appeared against the Petitioner or been questioned under oath in any hearing or court of law. Still, the District Court and Eighth Circuit opinions make reference to "facts" which are only

traceable to or have their genesis from a "anonymous phone tipster" and greatly fictionalized DIS writings.

The record of Petitioner and opinions concerning his lifetime character, his moral courage and his potential for future military service, are summarized in Appendix Exhibits C, D, and E.

The only allegations against Don Fuller which were considered by the administrative hearing board were contained in two civilian court records. Don Fuller responded to accusations by consenting to an exculpatory polygraph which demonstrated no deception and confirmed that despite the allegations, he had carefully avoided the conduct described in the allegations.

Even the original Complaint in civilian court admitted that Don Fuller had not been in any contact with an ex-friend. She admitted that she had been advised by a prosecuting attorney to file the complaint

after Don Fuller had documented and reported substantial unethical misconduct by the Eden Prairie assistant city attorney which included lying to a judge.

There exists within DOD an outdated and unconstitutional employment system which denies members of the uniformed services of the Armed Forces the rights guaranteed by the Due Process Clause and equal protection of the Fifth Amendment.

NO PROCEDURAL DUE PROCESS

Uniformed members of the Armed Forces do not receive procedural due process in many ways which include:

1. "Commander's influence" as to who is picked out for being "taken down" and who is to sit on the hearing panel:
2. Denial of a hearing before an administrative law judge whereas

civilian DOD employees are guaranteed such protection;

3. Reserve uniformed members of the Armed Forces have to pay their own way [without reimbursement] to distant hearings and to consult with an attorney whereas active duty military personnel receive pay, transportation and allowances and a nearby attorney to prepare for and attend the same non-due process hearings;

4. For a quarter (25 cents) anyone with a reason can become an "anonymous phone tipster" which triggers and engenders the DIS process of "fictionalized reports" and "ghost writings" which result in bogus military employment records and even court records due to the "business records" exception to the hearsay rule.

The absence of accountability and the denial of a remedy, encourages intentional degradation of the service member's reputation to bolster the military's contention that the individual was a non-performer. It encourages the issuance of military orders to see a military psychiatrist to "find something". It inhibits the Constitutional processes by which reputations could be rebuilt and employment records are corrected.

UNACCOUNTABLE MISCONDUCT AFTER "FERES"

The misapplication of the flawed **Feres Doctrine** which looks to the status of the victim to mechanically deny a remedy rather than holding the "individual" perpetrator accountable, engenders egregious behavior which is hereinafter briefly recounted:

> "Rape by flashlight of a junior enlisted male at his work station; wrongful termination of a secretary by the senior labor lawyer at a military base so that he could hire someone who would

give him head each afternoon at his desk; a mid-level military officer calling African-Americans "Spear Chuckers", "Orangutans" and "Gorillas of the Mist" and then receiving an award of some consequence at the end of tour despite there being a formal investigation; rape by shoe polish dauber of a junior enlisted male at his work station and his commanding officer is promoted to the grade of 2 star general; fictionalizing official employment records; ordering any grade personnel to see a psychiatrist when they report wrongdoing by senior personnel; retaliation for reporting that military personnel and DIS agents were selling illegal arms and equipment for profit before and during the war with Iraq; and promotion to the grade of 4 star Admiral and granting a $17,000.00 a year pay raise to Admiral Kelso who was accused of lying to a court-martial judge but who lacked the courage and integrity to initiate an investigation into the allegations or his own wrongdoing."

There is no legitimate governmental interest or rational basis for asserting that the federal or military workplace can be a safehaven for such unconstitutional and criminal misconduct toward any American citizen.

An individual does not cease to be a person nor should they forfeit their rights under the Fifth, Thirteenth, and Twenty-Seventh Amendments to the Constitution because he/she sometimes assumes a status as a member of America's Armed Forces or because he/she has taken an oath to voluntarily support the Constitution with his/her life, if need be.

It is accepted that the right or privacy must at times be somewhat curtailed as one serves in the military.

OPINIONS BELOW

The opinion of the Eighth Circuit Court of Appeals and the District Court in and for the State of Minnesota appear as Exhibits A and B, respectively, in the separate Appendices accompanying this Petition. Neither opinion considered the Constitutional issues presented by the Petitioner.

JURISDICTION

The Court of Appeals Order and Judgment in this matter was filed on July 18, 1994. This Court's jurisdiction is sought under Title 28 U. S. C. 1254 (1) and pursuant to Supreme Court Rule 10 (a).

The courts of appeal of the United States have rendered decisions in conflict with each other on the issue of exhaustion of remedies within the administrative processes of the uniformed services of the United States Armed Forces; this Court's decision in **Feres** deprives the civilian Petitioner and all military personnel of rights inherent in the Due Process Clause and the equal protections guaranteed by the Fifth Amendment for damages resulting in **Bivens**' claims; article 134 of the UCMJ is so vague, arbitrary and applied capriciously that it is unconstitutional; and SECNAVINST 1920.6 and Marine Corps Order 1900.16 deny Petitioner and all military personnel of the rights guaranteed by the Fifth Amendment.

No administrative process or federal court has yet considered any of the Constitutional questions raised by Petitioner.

STANDING AND RIPENESS

This is a case about DOD and DIS personnel first threatening and then acting to inflict intentional harm on a civilian attorney in retaliation for his exposing their continued harassment of his clients. Petitioner, despite substantial threats, also correctly reported illegal arms and equipment sales for profit by federal employees before and during the war with Iraq.

DIS retaliation was first aimed at the civilian attorney-client relationship and involved harassment of clients and Petitioner in the civilian workplace.

A more detailed explanation of the extent of the abuse is contained in Appendix Exhibits C, D, E, and F. Cooperating DIS agents confirmed that the unofficial DIS

abuse included obstruction of justice, illegal domestic surveillance and severe employment and sexual harassment. Exhibit F documents that a female employee suffered a miscarriage after receiving a tongue lashing from DIS Field Chief Robert Turay.

Don Fuller knew that without official assistance, no one could long endure the DIS tortured treatment.

Don Fuller developed **"OPERATION FERRETT"** which was peaceful law-abiding plan to slowly expose and peel back the illegal actions and cover-up within DIS of DOD; to assure a public record of the wrong doing; to remove as many wrong doing DIS agents as possible; and to always give the Petitioner the continuing right of court appeal.

An essential part of the plan which was never understood by the DIS agents is that Petitioner's clients were the primary occurrence witnesses to DIS crimes and harassment whereas the Petitioner was only an

occurrence witness to the boasts to illegally close down a major defense contractor. The plan being developed to ensnare DIS and to free Petitioner's clients from further harm unfortunately required Petitioner to become a "lightening rod" to absorb, focus and concentrate all DIS abuse on Petitioner while the case proceeded through the administrative process and then the courts. [Appendix Exhibits C through F].

Don Fuller then proceeded to provide the Justice Department with the results of his own local investigation of DIS abuses. Despite the DIS promises of 40 to 70 indictments, none of Fuller's clients were ever indicted. They too, had done nothing wrong.

DIS began an impermissible and illegal investigation of Don Fuller based solely on an "anonymous phone tip". DIS continued the investigation and then illegally disseminated fabricated reports into a military

administrative hearing room and the civilian workplace and to civilian clients of the Petitioner in violation of DOD and DIS policies, regulations and directives.

The Navy Department then asserted jurisdiction over the civilian Don Fuller.

Don Fuller consented to examination by a psychiatrist and without reporting the information concerning the illegal arms sales before and during the war with Iraq, he was determined fit for full duty.

All hearings and medical examinations were conducted at a time when Petitioner was not ever serving as a Marine Corps Reserve officer due to non-pay, no orders, and civilian auto related injuries resulting in a physical disability.

Don Fuller then made additional reports, despite face to face threats of death. Each report was confirmed by his clients and known persons of integrity.

Fuller finally made the report that a DIS agent plus Minneapolis based Army reservists were illegally selling arms and equipment for profit before and during the war with Iraq.

After making such report and despite the earlier finding of the psychiatrist, Don Fuller was now found to be delusional by a Navy doctor. He went so far as to opine that Fuller should not even be practicing law in the civilian community.

Fuller remained calm and resolute and appealed the Navy doctor's finding which was inconsistent with standardized psychological testing (MMPI) results which had confirmed Don Fuller lifetime normalcy and which was contradictory to the memory testing and civilian medical and psychological reports.

On December 15, 1992, a Navy board overruled the Navy doctor and Fuller was again found totally fit for duty as a Marine Reserve officer.

Petitioner paid his own way to and all costs of preparation [without reimbursement] for all medical and administrative hearings which had been threatened by DIS agents to "take down" Petitioner. [Appendix Exhibits C, D and E].

At all hearings, Petitioner was the only certified judge in the room. Rules of evidence were ignored and the senior hearing officer preferred an "anonymous phone tip" from someone of questionable character to Petitioner's exculpatory polygraph. Despite all attempts at "blackmail on the cheap", Petitioner resolutely persisted to expose DIS abuse.

After Petitioner pointed out the quality of personal testimony and the process of cross-examination versus believing "anonymous phone tipsters" the senior member threw a pencil in disgust at the Petitioner.

Petitioner was personally explaining the prior service he had performed to various

general officers and how clients had benefitted from the law offices which Petitioner had led to an American Bar Association award for providing the best legal assistance in DOD, worldwide.

After the pen throwing and Petitioner's resulting and justifiable silence, the administrative hearing panel then "deemed" that the civilian Petitioner had "committed" a military offense in violation of Article 134 of the UCMJ.

The panel of officers then recommended reduction in rank and loss of substantial pension benefits in addition to the taking of liberty and property through damage to Petitioner's civilian reputation as a lawyer.

Despite repeated attempts, DIS withheld documents from Don Fuller which were needed by Petitioner to appeal.

After receiving another face to face death threat, Don Fuller filed a Complaint in District Court rather than to continue

fencing with DIS in the streets and in the administrative process. [Appendix Exhibit L].

As a result of the events which began during September, 1988, Don Fuller has a **"personal stake"** in the outcome of this controversy; he has suffered and will continue to suffer for the remainder of his lifetime the requisite **"injury in fact"** **"fairly traceable"** to the government action which is **"redressable"** by the judicial relief requested.

The soured culture in the United States Navy Department and the resulting diminished national defense capability combined with the deprivation of individual human, civil and Constitutional rights demonstrates that this case is ripe and not moot.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth, Ninth, Thirteenth, and Twenty Seventh Amendments to the Constitution; 10

USC 801 Article 134 of the Uniform Code of Military Justice [UCMJ]; SECNAVINST 1920.6 and MCO 1900.16.

STATEMENT OF THE CASE

As a civilian attorney, Petitioner reported systemic and sustained abuse by DIS agents in the Twin Cities. [Appendix Exhibit C through F]. Official reports of DIS harassment resulted in severe DIS retaliation. criminal misconduct, and face to face death threats. [Exhibits C through F].

Petitioner recognized part of the problem as actions of those protected by **Feres**. He devised **"OPERATION FERRETT"** to first obtain a forum for "salting" a public record for official reports theretofore being officially ignored; to then patiently expose DIS misconduct; to assure that DIS agents reported on themselves the documents "salted in the public records" and to finally argue for overruling **Feres**.

Petitioner quietly appeared to be in trouble. He then used the judicial process to seek systemic and lasting change rather than continuing to endure a process which even if he prevailed would only affect his status within a military system not committed to the basic principles upon which our freedom and democracy are grounded.

At all times, Petitioner was mindful of American history and appreciated the plight of our ancestors when they agreed to be bound by **The Mayflower Compact**; when they charted (**for some Americans**) the exodus from human bondage through **The Declaration of Independence**; when they consented to be governed through the rule of reasoned law as envisioned by **The Constitution of the United States of America**; and how they must have welcomed the enlightened leadership of Chief Justice Marshall in **Marbury v. Madison** who steadfastly determined the essential role of the Supreme Court and confirmed America as a

nation ruled by reasoned law than a nation ruled by men.

To insure and protect those sacred principles our ancestors had rallied and become galvanized to spend treasure and shed blood for the common good in the Revolutionary War as they sought to escape an intolerable form of rule by noblemen.

In the Civil War, brother fought against brother and father against son due to the temporary failure of reasoned law and judicial indiscretion in the case of **Dred Scott v. Sandford** 19 How. 393 (1857) in which Chief Justice Taney had determined that Dred Scott was property and not therefore human.

In World War II, America during a time of great international struggle emerged as a world leader and through the expenditure of American blood and treasure assured that classes and nations of people were freed from oppression.

Color became less of an issue to those who served together during time of war; however, as demonstrated in **Korematsu v. United States**, 323 U. S. 214 (1944) race was still an issue due to the perceived threat of collaboration with a worthy opponent.

The Korean War demonstrated America's need for a cost-effective military reserve force in which civilians return to serve under temporary military jurisdiction to defend America's citizens and their Constitution.

Through time and by the passage of the 13th and 27th Amendments, people of color and women were finally accepted as humans.

Unfortunately those who have fought and died to assure peace have not always been recognized as humans nor given the same Constitutional rights ensured to those who receive the benefits of the veteran's selfless protection.

"FERES" AND "STANLEY" DECISIONS CREATE A "SECOND CLASS" OF CITIZEN.

In **Brooks v. U. S.**, 337 U. S. 49 (1949) the Court recognized a veteran as human and a tort remedy was permitted to ensure compliance with the Due Process Clause of the Fifth Amendment.

The Court in **Feres v. United States**, 340 U. S. 135 (1951) distinguished and left untouched its decision in **Brooks**.

Feres is otherwise a decision not in accordance with reasoned law. The class of humans known as military personnel became a class of honorably serving victims without remedies against negligent and intentional tortfeasors.

Veterans receive a lesser form of Fifth, Thirteenth and Twenty-Seventh Constitutional rights than guaranteed to all other citizens, including convicted felons and drug dealers from any American city.

The Court in **Chappell v. Wallace**, 462 US 269 (1983) continued to accept military

arguments citing the special factors involved which effectively deprived enlisted military personnel of any system or remedy to protect their own Fifth Amendment due process rights.

The Court in United States v. Stanley, 483 US 669 (1987) continued to accept military arguments and effectively legitimized the right to use military personnel as lab animals through secret injections of LSD. The dissents of Justices Brennan, Marshall, Stevens and O'Connor demonstrate the need for and better approach to reasoned law and the acceptance of individual responsibility which was first judicially recognized in Linsman v. Wilkes, 12 Howard 390 (US 1849), as follows:

> "It must not be lost sight of ...that, while the chief agent of the government in so important a trust, when conducting with skill, fidelity, and energy, is to be protected under mere errors of judgment in the discharge of his official duties, yet he is not to be shielded from responsibility if he acts out of his authority or jurisdiction, or inflicts private injury either from malice, cruelty,

> or any species of oppression, founded on considerations independent of public ends.
>
> The humblest seaman or marine is to be sheltered under the aegis of the law from any real wrong, as well as the highest in office."

In **Bivens v. Six Unknown Agents of Federal Bureau of Narcotics**, 403 U. S. 388 (1971), Justice Brennan understood the potential for harm when federal agents act under color of law but beyond the law and a federal cause of action for damages was recognized consequent upon the agent's unconstitutional conduct. The dissents of Justices Burger and Black in **Bivens**, although understood, are not applicable in the military because it is the **Feres Doctrine** which bars recovery. Congress lacks the power to overturn and reverse any Supreme Court decision.

Despite the Fifth, Thirteenth and Twenty-Seventh Amendments, there are still two classes in America since the question of equality for men and women in uniform who

defend the Constitution of the United States against all enemies foreign and domestic has not yet been decided by reasoned law.

The wisdom of the common law and the decision in **Dinsman v Wilkes** had much to do with the days in America when our privileges of freedom were best assured by the acceptance of individual responsibility and accountability.

Petitioner urges the Court to review its decisions in **Feres**, **Bivens**, **Chappell**, and **Stanley**. Petitioner also urges the Court to expand the distinction between individual responsibility for **Bivens**-claims and federal agency responsibility to fund a successful Bivens claim against an individual serving within that agency. There should be a clearer understanding of the harm suffered by individual victims and the need for agency supervision of those persons identified as dangerous but permitted to serve as federal employees.

A review of the wisdom of the "qualified immunity defense" so often raised by "individual defendants" and discussed in F.D.I.C. v. Meyers, 114 S. Ct. 996 (1994) is urged.

It is clear that those who presently volunteer to serve in uniform are being denied a remedy for Bivens-type intentional violations of their Constitutional rights due to the decision in Feres.

IMPERATIVE PUBLIC IMPORTANCE

This case is of imperative public importance for the following reasons:

The Navy system of justice is so infected with abuse and command influence that it is incapable of protecting the Constitutional, civil, employment and human rights of the individual service member. [Appendix Exhibits C, J, and K plus U. S. News & World Report article of November 9, 1992, pages 46-62].

Unfortunately those leaders evidencing questionable judgment at the highest levels have access to weapons systems and the lethal nuclear arsenal.

This petition urges the Court to review the question of whether there should be temporary judicial oversight of Article I Section 8 courts and the United States Navy administrative employment processes.

Only by such critical temporary judicial oversight of the United States Navy may the citizens of this nation be assured their peace, their prosperity, and the continued existence of our strong navy which are all essential for ensuring our freedom guaranteed by the Constitutional form of government.

The individual and collective freedoms ensured by our sacred Constitution and vitally necessary to assure a continued viable national defense capability are indeed at stake.

ARTICLE 134 OF THE UCMJ IS UNCONSTITUTIONAL

Article 134 of UCMJ denies all uniformed members of the Armed Forces of the United States of America of Fifth Amendment **substantive due process** since it attempts to regulate "disorders and neglects to the prejudice of good order and discipline in the armed forces". It is so vague that it does not give reasonable notice of what a soldier or sailor must do to avoid committing an offense on duty or even in the civilian community as a non-paid, non-dutied reservist.

Article 134 of UCMJ deprived Petitioner of rights guaranteed by the Due Process Clause and the equal protection of the Fifth Amendment.

Article 134 was also applied capriciously and in bad faith. The best example of such whimsical application is illustrated in the failure to prosecute Admiral Frank Kelso Jr. despite allegations

that Admiral Kelso lied to a military courts martial thereby obstructing justice.

The very same Admiral Kelso as acting Secretary of the Navy "deemed" Article 134 to apply to the civilian Petitioner who, at all relevant times, was not being paid nor in any duty status when an incident arose in the civilian community in which all legal and ethical issues were decided in favor of the Petitioner by a civilian court and the Minnesota lawyer's board of professional responsibility.

SECNAVINST 1920.6 AND MCO 1900.16 ARE UNCONSTITUTIONAL

SECNAVINST 1920.6 denies **all reserve** members of the Armed Forces of **substantive due process** by regulating conduct of non-paid IRR reservists in the civilian community which conduct **is without any service connection** and which permits the assertion of military jurisdiction into purely private civilian matters by "**deeming**" reservists to

have "committed" a violation of the UCMJ in the civilian community despite the absence of any conviction or even any sworn witness testimony ever presented against the reservist.

SECNAVINST 1920.6 and the use of a board of officers deprived Petitioner of the fair and impartial procedure guaranteed by the Due Process Clause and the equal protection of the Fifth Amendment. As a reservist Don Fuller was required to pay more than $3,000.00 to attend a distant employment hearing. Such hearing was before a panel of three officers without legal training whereas DOD civilian employment hearings are determined by administrative law judges.

THE COURTS OF APPEAL ARE IN CONFLICT

The courts of appeal of the United States Court are in conflict on the issue of whether a uniformed member of the Armed Services must exhaust all administrative

remedies before a United States District Court has jurisdiction to hear issues concerning loss of uniformed status and reduction in pay and rank and involuntary separation from the Armed Forces.

In summary form, the appeals courts are split on the requirements and necessity of exhaustion of administrative remedies as follows:

> Second Circuit. There is no federal court jurisdiction until administrative remedies are exhausted. Michealson v. Herren, 242 F. 2d 693 (CA2 1967).
>
> Third Circuit and the District of Columbia. The federal courts have jurisdiction even before all administrative remedies are exhausted and that the trial court should retain jurisdiction but stay consideration until administrative remedies are exhausted.
>
> An exception obtains where there are "special circumstances" dictating immediate judicial review. Nelson v. Miller, 373 F. 2d 474 (CA3 1967) Sohm v. Fowler 365 F. 2d 915 (CA D.C 1966).
>
> Fourth Circuit. In Reed v. Frank, 297 F. 2d 17 (CA4 1961). Trial courts have jurisdiction where the plaintiff has a

substantial claim that military regulations or procedures violate constitutional rights.

Fifth Circuit. The courts lack jurisdiction over military discharge complaints until all available administrative remedies are exhausted. Stanford v. United States, 413 F. 2d 1048 (CA5 1969).

Eighth Circuit. in Horn v. Schlesinger, 514 F. 2d 549 (CA8 1975) There must be exhaustion of administrative remedies except where "grave constitutional rights seem imperiled and the court entertains a presumption that the public officials acted properly and in accordance with the rules regarding their public office".

Ninth Circuit. Yet another approach is taken by the Ninth Circuit in Schwartz v. Covington, 341 F. 2d 537 (CA9 1965) where the Court stayed a discharge proceeding pending review by the BCMR.

Tenth Circuit. The Court has held that a plaintiff must exhaust administrative remedies even when there are Constitutional matters to be reviewed but in Bard vs. Seamans 507 F. 2d 765 (CA10 1974) court held that resort to the BCMR is not demanded where to do so "would be futile".

THE NAVY LAWYER'S PURPOSEFULLY MISREPRESENTED PETITIONER'S RECORD IN THE FEDERAL DISTRICT COURT

The proceedings in the District Court were stayed for about a year while the testing, rebuttal, and appeal process occurred in the Navy medical arena. On December 15, 1992, after the Petitioner had again paid his own way to a hearing in Bethesda, Maryland, Fuller was confirmed physically and mentally fit for duty with the United States Marine Corps Reserves.

Neuropsychological testing required for Petitioner by the Navy Department and administered in the Twin Cities, resulted in Petitioner scoring 99 percentile or 15/15 words remembered on the memory testing. Petitioner had a normal EEG and he obtained a normal MMPI.

The only matter of concern was that it was reported by a Navy doctor that Petitioner appeared delusional about the DIS agents who were messing with **his clients**. Don Fuller had only reported what his clients were experiencing. Don Fuller made it very clear

that he was not afraid of the DIS agents and Fuller accepted certain risks in representing his clients but did not anticipate the level of sustained official retaliation. [Appendix Exhibit C, D and E]. At all times, Petitioner remained certain that **"OPERATION FERRETT"** would work.

Despite the Navy doctor's findings, the civilian testing medical team saw nothing of concern or which would interfere with the Petitioner's military or civilian work.

The Navy psychiatrist for reasons known only to him, ignored all of the military and civilian employment opinions including the opinion of the Honorable David S. Doty, United States District Court Judge [Appendix Exhibit C, D, and E] regarding Fuller; strangely, the Navy doctor stated that Don Fuller was not any longer fit for duty as a United States Marine reservist. (Note - the previous year the same Navy psychiatrist had

found Fuller fit for duty to attend the administrative discharge hearing.

The only changed circumstances, between reports, were that Don Fuller had obtained absolutely "normal" findings with exceptional memory results on the intervening standardized testing and substantiated and reported the illegal arms and equipment sales by federal employees.

Unfortunately, Great Lakes Naval Hospital personnel chose to FAX the Navy doctor's opinion into the Petitioner's civilian law office at a time when Great Lakes personnel had first called and determined that Don Fuller was not there.

Petitioner then rebutted the Navy psychiatrist's opinion by demonstrating that what Don Fuller was reporting were the statements of his "civilian clients" as verified by photographs and affidavits of DIS harassment and criminal misconduct.

What was being reported were not the personal observations or thoughts of Don Fuller. Petitioner was normal except for the extreme concerns for his clients about the DIS misconduct and what appeared to be acts of treason by federal employees.

Petitioner exercised his rights under the Navy medical regulations and rebutted the finding of the Navy doctor.

On December 15, 1992, the Physical Evaluation Board in Bethesda, Maryland found that the Petitioner was totally fit for duty and that the finding of the Navy doctor was invalid.

The rebuttal documents contained in Fuller's military personnel files were intentionally omitted by the government attorneys in their motions and memorandum filed in District Court.

Despite having been advised by Marine Corps attorneys that intentional fabrication of Fuller's personnel records would be

illegal, the Navy lawyer chose to submit into the civilian community and to the District Court the invalid, overturned and temporary Navy doctor's findings, which included the Navy doctor's determination that Don Fuller was not fit to practice law in the civilian community.

Don Fuller countered with discovery including Requests for Admissions thereby seeking official confirmation of the extent of the Navy lawyer's misrepresentation to the District Court. [Appendix Exhibit K]. The AUSA and the Navy lawyer then obtained an order denying any discovery.

The District Court trial judge saw nothing wrong with the actions of the Navy lawyer and the AUSA and dismissed Fuller's Complaint since the Petitioner had by then been involuntarily retired from the Marine Corps Reserves. [Appendix Exhibit B].

The District Court trial judge contemporaneously ruled that Fuller's plenary

Petition for expungement of the record falsified by DIS agents could not be considered because Fuller had not exhausted all administrative remedies. [Appendix Exhibit B].

CONCLUSION

Since Petitioner first determined 72 months ago that Americans serving DOD and their country were suffering systemic and repeated abuse and since Petitioner planned and then implemented **"OPERATION FERRETT"** designed to root out and expose unparalleled levels of employment harassment it has been envisioned that the wisdom of the commitment to reasoned law would prevail.

Don Fuller always believed that the respective "offices" of the Commander in Chief and the Solicitor General would, to some extent, someday be allies with and not foes of the Petitioner's claims.

The drafters of the Constitution provided for three branches of government

with separate powers trusting that men and women within those branches would eternally and faithfully fulfill the sacred responsibilities of their respective offices and be diligent in acting so that no single branch ever became too strong or too weak to ensure the necessary balance in our democratic form of federal government.

The essential premise of the Constitution as affirmed in **Marbury v. Madison** is that America is a nation governed by reasoned law and not by men or women.

Of great national concern is that those Naval admirals who have demonstrated through their actions that:

1. they lack integrity and moral courage:

2 they will not respect the individual, civil, human and Constitutional rights of the men and women entrusted to them; and

3. they will obstruct justice

are "some" of the same admirals entrusted with the safekeeping of tactical and strategic nuclear weapons and delivery systems.

Petitioner urges the Court to review its holdings in **Dinsman v Wilkes, Feres, Bivens, Stanley**, and **Chappell** in light of the current appreciation of the particular circumstances required, by a nation deeply rooted and committed to the furtherance of and protection for basic human rights, to raise and maintain an all-volunteer military force in the nuclear and space age.

It is the holding in **Feres**, not any act of Congress or the President, which currently bars the most gifted nuclear engineer or the most common patriot serving in uniform of a recovery, based solely on status, for serious and intentional deprivations of their Constitutional rights or injuries sustained incident to their service.

It is time to trust and protect the sailors and Marines honorably serving in uniform and to root out and hold accountable those who fail to uphold the special trust and confidence and oaths of their official positions.

Petitioner also urges the Court to resolve the conflicts between the circuits concerning "exhaustion of administrative remedies" when grave Constitutional rights are involved and men with "no discretion or integrity" make official decisions.

THE REMEDIES

By deciding that Article 134 of the UCMJ is unconstitutional the primary instrument for disparate treatment of military personnel would be removed.

By deciding that SECNAVINST 1920.6 and MCO 1900.16 are unconstitutional, the process which requires military reservists to pay their way to distant due process hearings would be stopped. The fundamentally unfair

uniformed personnel hearing process before a panel of three officers would be halted.

By overruling **Feres**, highly trained and well educated voluntary military personnel would no longer end up as second class citizens who are denied financial recovery for tortuous damages simply because of their status.

By fashioning some form of temporary oversight of the Navy Department the Navy may someday again be a governmental agency in which men and women of honor and integrity uniformly serve and by their selfless service inspire renewed national commitment to acceptance of individual responsibility.

For the protection of those in uniform and for the future defense needs of America, it is essential that the integrity of the United States Navy be restored.

Without temporary judicial oversight the immediate horror stories will continue to daily effect too many uniformed personnel and

their loved ones and undermine national defense security interests and capability.

POSTSCRIPT

There is no legitimate or justifiable governmental reason permitting insidious "official" discrimination by individuals with known propensity for harming others with **Bivens**-type treatment.

Perhaps the process of judicial review will also engender Congressional inquiry into:

(1) the lending practices by which FDIC and FSLIC insured institutions routinely deny loans to veterans because of their "transient status";

(2) the disparity of treatment between high school graduates who receive government guaranteed "loans" and become college students versus those who elect to serve their

country in uniform and struggle to survive;

(3) the reasons why uniformed personnel receive a "second class medical plan" instead of treatment by skilled, insured civilian surgeons and physicians during peacetime and certainly when their blood is shed during times of war;

(4) the irreversible economic damage done to veterans when they move throughout the world on a moments notice leaving homes and families behind.

Only when veterans are fully recognized as humans in uniforms rather than expendables will they obtain the rights and status of full American citizenship in both their military and civilian occupations and communities.

Acts of war will always be inhumane; however, there is no justifiable reason for

civilian and military leaders to breach the special trust and confidence of their position or inhumanely treat those who elect to serve in uniform.

The next time America's sons or daughters lose their limbs or lives in war, it would of some comfort to know that America's best doctors were nearby and equally shouldering the ultimate burden of American citizenship when they suffered.

Only then may the Commander-in-Chief, each member of congress and each general and each admiral rightfully join in saying, "we did our duty".

Respectfully submitted,

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Dated: October 10, 1994 Appendix
Exhibits A-L are separately bound.

From exhibit attached to Appendix F. A 24 hour stakeout vehicle in front of civilian home in civilian community. Upon checking with DMV it was determined that license plate "KC40GR" was not a plate issued by the state.